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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA"),

Petitioner,

v.

RAN-DAV'S COUNTY KOSHER, INC., *et al.*,

Respondents,

and

STATE OF NEW JERSEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

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PETITIONER'S REPLY BRIEF

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The respondents raise only one subject that warrants submission of a reply. The remainder of the assertions made in the Brief in Opposition are adequately covered in our Petition.

Respondents ask that certiorari be denied on the asserted ground that COLPA's standing is controlled by *Diamond v. Charles*, 476 U.S. 54 (1986), where a pro-life doctor unsuccessfully tried to appeal a ruling that the Illinois Abortion Law was unconstitutional although the State had failed to appeal. Respondents ignore the distinctions between *Diamond v. Charles* and this case, and wholly fail to mention *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297 (1983), which, in fact, controls this case and supports the conclusion that the constitutional issues on which both COLPA and the State of New Jersey disagree with the majority of the court below are properly before this Court for decision.

The Court majority in *Diamond v. Charles* noted at the outset of its opinion that the private party who supported the constitutionality of Illinois' Abortion Law was one "whose own conduct [was] neither implicated nor threatened" by the law. 476 U.S. at 56. The Court held that, if the State did not appeal, it was not sufficient for the appealing intervenor to be a pediatrician who opposed abortion legislation and who described himself as "a doctor, a father, and a protector of the unborn." 476 U.S. at 66.

The Court did *not* rely, as the respondents are urging the Court to do in this case, merely on the fact that the State had not appealed. Respondents argue that it follows from the fact that the private intervenor could not secure review by this Court in *Diamond v. Charles* that the same result should follow here. But it was only after going through a careful analysis of the intervenor's interests (476 U.S. at 65-67), that this Court concluded in *Diamond v. Charles* that he had no legal interest that gave him standing as a party to any case or controversy. Indeed, Justice O'Connor believed that he was not even a proper intervenor in the lower court. 476 U.S. at 73-78.

This case is wholly different. COLPA is a well-recognized organization, known to this Court and to lower courts as the spokesman for the Orthodox Jewish community. [1] Its members include consumers who are most directly and immediately protected by truth-in-advertising regulations relating to kosher foods. In applying for leave to intervene, COLPA advised the New Jersey Supreme Court that it spoke for the Orthodox Jewish community, "the main consumer of Kosher food in America." That representation

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[1] A roster of the cases in this Court in which COLPA has represented parties or filed *amicus* briefs on behalf of the Orthodox Jewish community is the following: *Zobrest v. Catalina Foothills School District*, No. 92-94; *Lamb's Chapel v. Center Moriches Union Free School District*, No. 91-2024; *Church of the Lukumi Babalu Aye, Inc. v. Pichardo*, No. 91-948; *Lee v. Weisman*, 112 S. Ct. 2649 (1992); *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 572 (1989); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986); *Goldman v. Weinberger*, 475 U.S. 503 (1986); *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Estate of Donald E. Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985); *Mueller v. Allen*, 463 U.S. 388 (1983); *Bob Jones University v. United States*, 461 U.S. 574 (1983); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Committee for Public Education v. Regan*, 444 U.S. 646 (1980); *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Tilton v. Richardson*, 403 U.S. 672 (1971); *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971); *Stimpel v. State Personnel Board of California*, 400 U.S. 952 (1970); *Walz v. Tax Commission of the City of New York*, 396 U.S. 925 (1969); *Flast v. Cohen*, 392 U.S. 83 (1968); *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968).

was never challenged and the application to intervene was unopposed. Respondent cannot now claim, as it does in its Brief in Opposition, that the factual record is inadequate if it wholly failed to contest the requested intervention and to demand a more specific factual showing in the court below. In any event, the Affidavit of Dennis Rapps, Executive Director of COLPA, that appears as Appendix I, establishes the necessary facts for such standing.

Rather than being an intervenor who has only an "abstract concern" for the law being challenged, the members of COLPA and the larger Orthodox Jewish community COLPA represents suffer a direct "injury in fact" by reason of the New Jersey Supreme Court's 4-to-3 declaration that the law is unconstitutional. The organization clearly has standing to represent the interests of its members in the effective regulation of merchants falsely describing their products as "kosher" as surely as an organization representing the elderly had standing in *Schweiker v. Gray Panthers*, 453 U.S. 34, 40 n.8 (1981).

Nor is the interest of COLPA's members an interest that may only be vindicated by New Jersey's Attorney General. In *Diamond v. Charles*, the law was a criminal statute, and this Court observed that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." 476 U.S. at 64, quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973). To be sure, the New Jersey law at issue here authorizes the Attorney General to assess penalties against anyone who has engaged in an "unconscionable commercial practice." New Jersey Stat. Ann. § 56:8-3.1. Under N.J.S.A. § 56:8-8 the Attorney General may also obtain an injunction against any such practice. But N.J.S.A. § 56:8-19 provides, as well, a private right of action:

56:8-19. Action or counterclaim by injured person; recovery of treble damages and costs

> Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act . . . may bring an action or assert a counterclaim therefor in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit.

Under this provision any member of COLPA, or any other consumer of kosher food, who purchases food branded "kosher" in New Jersey and subsequently discovers that the food he purchased was known not to be kosher may bring a civil lawsuit for damages in which treble damages plus attorneys' fees may be recovered. The 4-to-3 decision in the New Jersey Supreme Court denies this otherwise available civil remedy to a person who has purchased meat or other non-kosher items from the respondent's store and who discovers that the meat does not meet the standard of the invalidated regulations. Prior to the decision of the court below, the existence of a civil right of action was firmly established by the regulation that defined "kosher." After the decision, COLPA and its members have no right to sue for

damages against Ran-Dav or anyone else who sells meat as "kosher" that does not meet truly kosher standards.

For these reasons there is absolutely no merit to the claim that the petition must be dismissed at its present juncture because COLPA lacks standing under Article III. COLPA has Article III standing, and the split decision of the New Jersey Supreme Court unjustifiably denied COLPA and its members the right to pursue consumer deception actions in Baltimore.

Moreover, there is a difference in these circumstances between review on certiorari and review on appeal. In *Director, Office of Workers' Compensation Programs v. Perini North River Associates*, 459 U.S. 297, 302-05 (1983), this Court noted that all parties to a decision below remain parties under this Court's Rules, regardless of who petitions for a writ of certiorari. The Court agreed that a respondent may "seek reversal of the judgment . . . on any ground urged" in the lower court (quoting from *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 783-84 n.14 (1980)). Hence the party who brings the case here need not be the same party who has Article III standing. So long as the party with Article III standing is before the Court — whether by his own petition or as a "respondent," by virtue of Rule 12.4 — that party may present a case or controversy by taking a position on the litigation that is adverse to the position of another respondent. That is exactly what has happened in this case. The State of New Jersey has stated in its brief to this Court that it agrees with COLPA and disagrees with the other set of respondents. Hence this case should proceed to a decision just as the *Perini North River Associates* case did.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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February 1993

APPENDIX I

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AFFIDAVIT OF DENNIS RAPPS

Dennis Rapps, an attorney-at-law admitted to the Bar of the United States Supreme Court and the courts of the State of New York, under the penalties of perjury, affirms as follows:

1. I have been the Executive Director of the National Jewish Commission on Law and Public Affairs ("COLPA") since 1970 and I am personally knowledgeable about the backgrounds of most of its members.

2. COLPA has a number of members who reside in the State of New Jersey who I know to be kosher food consumers.

3. As kosher food consumers these COLPA members would have a private right of civil action for alleged violations of the regulations invalidated by the Supreme Court of New Jersey.

Dated: New York, New York
February 8, 1993

/s/
DENNIS RAPPS